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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

MARGARITA LIGHTBOURN,
BURNS TAYLOR, OLIVIA SCHONBERGER,
GRANT DOWNEY, ANN LEMKE, and
DISABLED ABILITY RESOURCE ENVIRONMENT

Petitioners

V.

ANTONIO O. GARZA, Jr.,
SECRETARY OF STATE OF TEXAS

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

When a State's chief elections officer fails to modify the election practices, policies, and programs which he administers, so that citizens with disabilities are not afforded an equal opportunity to enjoy the right to cast a secret ballot, does he violate Title II of the Americans with Disabilities Act?

Was the Fifth Circuit's incorporation of a virtual "intent-to-discriminate" requirement into Title II of the ADA, and rejection of the "effects" test contained in the Act, error and contrary to Congressional intent?

PARTIES TO THE PROCEEDINGS

The parties to this case are:

Petitioners: Margarita Lightbourn, Burns Taylor, Olivia Schonberger, Grant Downey, Ann Lemke, and the Disabled Ability Resource Environment (DARE).

Respondent: Antonio O. Garza, Jr., Secretary of State of Texas.

Counsel is unaware of any person or entity with a financial interest in the outcome.

Counsel in this case are:

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INTRODUCTION

For Texans with disabilities, the Fifth Circuit's judgment in this class action severely diminishes the most fundamental element of a representative democracy, the right to a secret ballot. The court's ruling subjects voters with disabilities, such as Petitioners, to "separate and unequal" status. That discriminatory treatment violates Title II of the Americans with Disabilities Act (ADA).

This Court would never tolerate the discrimination which the Court of Appeals sanctioned were it based on race or sex, and the Court should make it clear to the nation that it will not permit discrimination based on disability.

Petitioners turn to this Court for vindication of their legal rights, and their dignity. The Court's ruling in favor of Petitioners would protect the rights of blind voters throughout the country, and voters with disabilities. This case serves as the "guidepost" against which other courts will apply Title II of the ADA to the franchise for people with disabilities.

Petitioners respectfully ask the Court to breathe life into the promise which Congress made to Americans with disabilities that the long years of second-class citizenship and discrimination must come to an end.

The ruling below allows the Texas Secretary of State to deny blind and visually-impaired citizens the right to cast a secret ballot -- a fundamental constitutional right in Texas, like all other Texans. That ruling also guarantees the continuation of discrimination against citizens with mobility impairments, who face the barrier of physically inaccessible polling sites on election day. All that Petitioners seek is the same right and benefit that citizens without disabilities enjoy on election day. Nothing more.

The Secretary of State, as Texas' chief elections officer, plays a pivotal statutory role in elections held in Texas, at all levels. He has certain mandatory duties under the law to assure the functioning of voting by secret ballot. The Texas program

of voting by secret ballot is a program for ADA purposes.[1]

The Secretary has refused to reasonably accommodate Petitioners and the class members, and their disabilities, in the exercise of the secret ballot. As such, he discriminates against Petitioners and the class members. The ADA expressly prohibits this form of discrimination based on inaction.

The Secretary's most singular violation of the ADA is his refusal to assure that the new voting systems and voting system equipment are accessible to voters with disabilities. Texas law gives him the sole legal responsibility for certifying all voting systems or equipment used in Texas elections, except for simple paper ballots. Yet, he has made no effort to administer this program in compliance with Title II of the ADA.

The net result of the Secretary's ADA violation is that blind voters must tell another person how to mark their ballot for them. They cannot do it themselves, even though there are very simple and inexpensive adaptations that would allow blind voters to vote secretly.

This discrimination also flows as a natural consequence from the Secretary's failure to conduct the self-evaluation required by the ADA of that part of the state's voting system, which he administers, and of the effects of his policies and practices to determine if they cause discrimination, even unintentionally. A proper self-evaluation would have led the Secretary to change his methods of certifying election systems

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[1] The Court of Appeals never considered that a fundamental element of the right to vote in Texas is the secret ballot. This right is guaranteed by the state constitution, and delineated in Texas case law. The privacy component of the right to vote is critical, and it is what Petitioners sought to protect in this litigation. Ignoring this issue gave the appellate court greater flexibility in ruling as it did. Had it focused on the fundamental privacy right, its ADA analysis should have been substantially different.

so that they would accommodate voters with visual and physical disabilities.

The Secretary likewise failed to assure that the primary elections for political parties are held in compliance with the ADA, despite being, in essence, the sole funding source for the political primaries (currently $10-$12 million). Nor did he conduct an ADA self-evaluation in this regard. A self-evaluation surely would have compelled him to require the parties to utilize election processes that accommodate voters with disabilities.[2]

The Secretary also failed to conduct a self-evaluation process pursuant to 28 C.F.R §35.105(b) to measure whether other aspects of his election program, practices, or policies discriminate against voters with disabilities, and, if so, modify them to remove the discrimination.

For example, the Secretary did not adapt and modify the duties of his office to issue advisories and directives to include information about ADA compliance in elections.[3] Nor did he adapt his toll-free phone line to provide information for blind voters.

The Fifth Circuit put its stamp of approval on each of these discriminatory failures by the Secretary. Even worse, the Court

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[2] As with the privacy right, the Court of Appeals opinion also avoided this issue altogether, perhaps because the Secretary's ADA duties are so clear and direct on this point.

[3] The circuit did find that the Secretary "arguably breached" his duty to assure uniformity in the administration of elections statewide with regard to accessibility issues, but, nevertheless, the breach of "that duty ... could not have denied any benefit to plaintiffs." *Lightbourn v. County of El Paso, Tex.*, 118 F.3d 421, 432 (5th Cir. 1997) (Appendix A, A-21). The court offered no explanation of its logic, which actually seems counter-intuitive. Certainly, it would benefit to voterswith disabilities to have uniform voting practices.

of Appeals inserted a virtual "intent-to-discriminate" requirement into the ADA, substituting it for the "effects" standard clearly expressed and intended by the ADA. Such a ruling effectively guts Title II's prohibition against disability-based discrimination, generally and as it relates to voting.

This case is of national importance for it affects every disabled citizen's most cherished and fundamental right: the right to participate equally in democratic government. This is the very kind of right that Congress sought to protect in passing the ADA.

This case also has national impact because it radically revises the requirements that Title II imposes on state governments, effectively relieving them of any programmatic duties under the ADA.[4]

This Court should set aside the appellate ruling and reinstate the judgment of the district court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is in Appendix A. The findings of fact and conclusions of law by the District Court are in Appendix B; and its Final Judgment, in Appendix C.

JURISDICTION

The Court of Appeals filed its judgment on August 1, 1997, and overruled Petitioners' motion for rehearing on September 3, 1997. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

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[4] A very similar case is now pending in the U.S. Court of Appeals for the Sixth Circuit as to the Michigan Secretary of State's ADA duties with regard to blind voters. In that appeal, the United States has filed a brief in intervention, reflecting a position that is identical to that of Plaintiffs here. *King Nelson v. Candice S. Miller, in her official capacity as Secretary of State for the State of Michigan*, No. 97-1155 (U.S. Ct. of Appeals, 6th Cir.).

STATUTORY PROVISIONS INVOLVED

Title II of the ADA, 42 U.S.C. §§12131-12134; 28 C.F.R. §§35.105(a), 35.130(b)(1)(ii); Texas Election Code §§ 122.001, 122.031. These provisions are in Appendix D.

STATEMENT OF THE CASE

Proceedings Below

There are seven Petitioners, five of whom are blind voters in Texas. The sixth Petitioner has a severe mobility impairment, and the seventh is a private nonprofit group that assists and represents persons with physical and visual disabilities.

Petitioners originally filed this case as a class action against El Paso County and the local Republican and Democratic parties under Title II of the ADA and §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794). Subsequently, El Paso County impleaded the Texas Secretary of State, and Petitioners then added him as a defendant as well.

Petitioners alleged that, in violation of the ADA and §504, the Secretary played a key role in the fact that polling sites and voting procedures throughout Texas were inaccessible to individuals with visual and mobility impairments. They claimed that the Secretary contributed to the denial of the same right to vote secretly to blind and visually-impaired voters, as enjoyed by others. They also alleged that the Secretary contributed to the existence of polling places in Texas that are inaccessible to voters with physical impairments.

The district court certified Petitioners to represent all Texas voting age citizens who are blind or mobility-impaired. The local Republican Party was dismissed, and El Paso County and the local Democratic Party settled with Petitioners,[5] leaving the

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[5] As discussed later in greater detail, the County adopted a very simple and inexpensive method of using a tape recording, a Walkman, and a plastic-like ballot overlay that allowed blind voters

Secretary as the sole defendant.

After the liability phase of the trial, the district judge found, *inter alia,* that: (1) the secret ballot is a fundamental constitutional right in Texas; (2) the Secretary is the chief elections officer for the state, on whom political subdivisions call for advice and who bears responsibility for assuring uniformity in the various voting systems used in Texas; (3) the the Secretary could accommodate voters with disabilities without affecting how non-disabled persons currently vote, that is, without fundamentally altering the nature of the vote for other citizens; and, (4) the Secretary was in violation of the ADA for not modifying his own duties and practices to accommodate voters with disabilities.

Following the remedy phase of the trial, the trial court issued its Final Judgment and crafted a remedy for the Secretary's ADA violations. The judge also found that: (1) the Secretary administered his licensing and certification system for Texas voting systems in such a way as to illegally discriminate against blind voters; (2) this occurred in part because the Secretary did not conduct a self-evaluation of that part of the voting program he administers for possible discriminatory effects as to mobility-impaired and blind voters; (3) even though, by law, the Secretary funds virtually all election expenses for political party primaries (currently $10-$12 million), he allows the parties to hold primaries at polling sites that are physically inaccessible and does not require use of a secret ballot adapted for blind voters; and, (4) one of the reasons this occurs is that the Secretary has not conducted a self-evaluation as to voters with visual and mobility impairments in primary elections.

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cast a secret ballot. The County also agreed to make sure that all its polling places were accessible.

One of the district judge's remedial orders required that, after December 31, 1996, the Secretary not approve any new voting system that was not ADA-accessible and did not preserve ballot secrecy for blind voters. He required the Secretary to distribute guidelines and instructions to manufacturers seeking approval of their voting systems that their systems be accessible to mobility-impaired and blind voters.

The district court did nothing more than require the Secretary to tailor his non-delegable mandatory election duties with those duties imposed on him by the ADA. The final order made it clear that it addressed "only those matters over which the Secretary has direct control." *Lightbourn v. Garza*, 928 F.Supp. 711, 716 (W.D. Tex. 1996) (Appendix C-10).

In essence, the trial court looked at those unique election functions which the Secretary performed, and found that, everything he did, he did wrong for ADA purposes. The reason for that was he had done nothing to comply with the ADA.

The Secretary appealed from this relatively mild order, with its generous deadlines for compliance, and the Court of Appeals reversed and rendered judgment for Secretary.[6]

Statement of Facts

The most striking fact in this lawsuit is that, until the settlement with El Paso County and the local Democratic Party, not a single polling place in Texas provided a means for a blind or visually-impaired citizen to cast a secret ballot. This was true despite the fact that the Secretary administers a licensing

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[6] The Court of Appeals also reversed, on other grounds, the district court's judgment in favor of Petitioners' §504 claim. Petitioners only bring forward their ADA claim inasmuch as prevailing on this claim accords them the same relief, if not more, as succeeding on the §504 claim. However, the fact that Petitioners had to seek relief under the ADA indicates the Secretary's longstanding lack of compliance with §504.

and certification system whereby he approves the voting systems or equipment to be used by election officials. Under Texas law, the Secretary is the sole approving authority for all voting systems used in the state. He has been approving, and continues to approve, voting systems that subject blind voters to discrimination on the basis of their disability.

Mobility-impaired citizens did not fare much better: the record showed widespread non-compliance throughout Texas with ADA physical accessibility requirements. Mobility-impaired citizens are impeded and discouraged from voting.

At trial, Petitioners presented three different surveys to show the geographical breadth of inaccessible polling sites. Data from the Federal Elections Commission, which the Secretary had gathered and forwarded to the FEC, pursuant to the Voter Accessibility Act for Elderly and Handicapped Persons,[7] showed 800 polling places around Texas to be physically inaccessible in some fashion.[8]

A second survey by Advocacy, Inc., of counties in Texas, using ADA Accessibility Guidelines (ADAAG),[9] showed that, of the 69 responding counties, 16 (25%) reported having inaccessible polling places (25% of the places in Tarrant County, where Fort Worth is located, for example, were inaccessible).

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[7] 42 U.S.C. §1973ee, *et seq.* (1984). This law, an amendment to the Voting Rights Act, concerned federal elections only, and not state and local elections; its reporting requirements expired in 1994.

[8] These surveys relied upon accessibility criteria from the Voter Accessibility Act, which are substantially narrower in scope and weaker than the ADA Accessibility Guidelines (ADAAG).

[9] 28 C.F.R. Ch. 1, Pt. 36, App .A. *See* Plaintiffs' Exhibits 3, 17 (trial exhibits and deposition transcripts are part of the appellate record, but are not numbered as part of the record).

This data, and the FEC data, is self-reported. Although this accounts for diminished reporting, it adds weight to the findings because they are admissions of possible ADA violations by the counties.

Third was a survey of all polling places in El Paso County by an elections judge, using ADAAG, which showed that 33% of the polling places were inaccessible in some fashion or another. These places lacked simple accessibility features like handicapped parking, ramps, and curb cuts.[10] If bathrooms wee taken into account, 85% (93 polling places) would be inaccessible. 8 ROA 395 (Record on Appeal).

Moreover, not one polling place in Texas provided a ballot mechanism by which a blind voter could cast a secret ballot. That occurred because the Secretary does not believe that the ADA requirement of making the secret ballot usable by blind voters applies to him.

Petitioners' testimony substantiated the class data. Carri George, Director of DARE Independent Living Center, using data from the United States Census and the Texas Commission on the Blind, testified that approximately 275,000 Texans are blind or have severe visual impairments. Ms. George also reflected on her expert knowledge that physical access and the lack of secret ballots was a concern to the disability community across Texas. 9 ROA 491.

Burns Taylor, who is blind, had voted in Travis County and El Paso County, but without a secret ballot. 8 ROA 307.

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[10] Testifying at the remedy phase of the trial, El Paso County elections administrator Helen Jamison agreed that, prior to settlement, many polling places in the county were physically inaccessible, but that polling locations (such as schools) had agreed to remedy the problems when approached by El Paso County, as required by the settlement with Petitioners. 10 ROA 829, 830-31.

Ann Lemke, who is also blind, had voted in Travis and El Paso Counties, and faced the same problems. *Id.* 391.

Olivia Schonberger, who is blind, had voted in Fort Worth and now votes in El Paso, but could not vote a secret ballot in either location. 8 ROA 262.

Frank Lozano, also blind, had voted in Dallas County and El Paso Counties. In Dallas, the situation was even more difficult for him because the crowd waiting to vote, while he was being assisted, was larger than what he experienced in El Paso. 7 ROA 114-15.

Mr. Lozano also pointed out that blind voters, even though they have no other physical disability, depend on ADAAG physical access standards to help with their mobility because of the impact that blindness has on their movement; issues of ramps, curb cuts, knowing how to navigate around bathrooms, and so on, are critical. 7 ROA 83.

Margarita Lightbourn, who has a severe mobility impairment and often uses a battery-powered chair, voted in various places in El Paso County. Everywhere, she encountered accessibility problems: lack of proper parking, curb cuts, and ramps, high voting booths not usable by people in wheelchairs, and the problem of having to wait in line for two hours and then use a bathroom that ultimately might not be accessible, as well as losing a place in line. 5 ROA 55.

Ms. Lightbourn pointed out the same infirmities infected Democratic primary conventions.[11] The Secretary's invocation of early voting did not resolve these issues because, as Mrs.

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[11] In Texas, party precinct conventions are held at the location of the primary elections, immediately upon closing of the polls. Thus, an inaccessible polling place for a primary election also would be inaccessible for the party precinct convention. *See* Tex. Elec. Code Ann. §§174.021, 174.022, 174.025, & 174.026 (Vernon 1993).

Lightbourn showed, early polling places had the same accessibility problems. *Id.* 53. Nor does early voting cure inaccessible party precinct conventions.

Robin Collins, attorney and representative for the El Paso County Democratic Party, recognized physical accessibility difficulties in polling places throughout El Paso County and East Texas, where he had practiced law for a number years. Often, the latter were worse than in El Paso. 8 ROA 422-23.

Mr. Collins, who helped conduct Democratic primary elections, said that the party never received information from the Secretary about choosing accessible sites, even though he routinely sent out information about other matters he deemed important. Nor did he ever suggest that the party do an ADA self-evaluation, or even mention the ADA in any mailout. Mr. Collins, as did other witnesses, indicated that directives from the Secretary would greatly affect access issues in all 254 counties in Texas. *Id.* 423-25, 439-40.

The humiliation and embarrassment felt by Petitioners is exacerbated on days of heavy voting when there are lines and confusion at the polling places. Mr. Lozano, for example, had great difficulty finding someone to read him the ballot bond issues and amendments, then asking that they re-read it so he could understand the issues before voting. 5 ROA 61-62; 7 ROA 81. His experiences were so bad that they discouraged him from voting for a number of years. 5 ROA 62; 7 ROA 90.

Some problems are worse. Ms. Schonberger described how polling officials were confused about dealing with her because she was blind. 8 ROA 262. Ballot amendments are difficult to understand because of the legal language; and she was nervous and humiliated by how much time it took for her to get a satisfactory reading and explanation, while the line built up behind her with impatient voters. *Id.* 268. Ms. Schonberger wants to read ballot information for herself. *Id.* 275.

Grant Downey, also blind, felt humiliated by the confusion caused when he asked people to help him to understand the ballot and that the polling workers made a big deal out of it his voting. *Id.* 311, 335-38. He had the same experience in virtually every place he voted. *Id.* 344. Ms. Lemke discussed her experiences as well and the demeaning and patronizing way in which poll workers would talk about helping her to vote, as if she were not there present. *Id.* 387.

Apart from this, the Texas constitutional right to secrecy enjoyed by voters does not accrue to current systems used by voters who are blind. For example, Ms. Lemke heard after voting that her preference was different from that of the person who helped her vote. This caused her to wonder whether her ballot had been marked as she had wanted and would have done, had the ballot been accessible to her. *Id.* 392.

Ms. Schonberger discussed the common complaint of blind voters that, when they have to tell a third person their choice for the ballot, it is virtually impossible for others not to overhear. That happened to her (*id.* 262), and Mr. Lozano (7 ROA 84).

One of the ADA's primary goals is to assure and protect the independence of persons who have disabilities. This is precisely where Petitioners focused. Mr. Taylor testified it was very important to him to function as independently as possible and that was why he wanted to cast a secret vote by an adapted ballot. 8 ROA 290-91. Mr. Lozano wanted the same ability so he could spend time studying a ballot issue or an amendment and then appropriately vote. 7 ROA 81.

Virtually everyone who testified indicated how important it was to be able to vote on the actual day of the general election because of last minute electoral shifts, and because issues become more focused a few days before the election. *See, e.g.*, 5 ROA 52 (M. Lightbourn); 8 ROA 285 (O. Schonberger). These are the same reasons that sighted voters generally wait,

rather than taking advantage of early voting opportunities.

The evidence was more than sufficient to convince the trial judge that substantial access barriers for Petitioners and class members existed throughout Texas, in violation of the ADA.

Although until their settlement with El Paso County and the local Democratic Party, no local or statewide program had implemented a system that permitted voters who are blind to cast a secret ballot, Petitioners proved the reason for this was not lack of technology, but lack of vision by public officials, who failed to see the simple technologies that could be readily adapted to accomplish secrecy of the ballot for blind voters.

Although considerable trial testimony occurred about creating accessible secret balloting systems for blind voters, Petitioners did not ask the court to order implementation of any system. Nor did the court do so. Rather, Petitioners offered the testimony to show that such systems were easily achievable. That meant the Secretary should apprise voting system manufacturers to develop their systems accordingly, if they wanted him to approve them. This also meant that he would have information at hand to advise local election authorities of the potential for adapting their current systems to bring them into compliance with federal law.

Adapting current balloting systems was so simple that Petitioners themselves designed two methods, and a variety of easy applications, to allow blind voters to cast a secret ballot.

The components of the El Paso system, which are typical of that used in other areas of Texas, comprise a portable plastic box-like container about 24" x 18", with an attached stylus, a punch card ballot, a set of pages with candidate/amendment information, and electronic counting system that collates, reads, and stores the ballots.

The punch card and candidate/amendment information pages are inserted into the top of the plastic container set on a

table inside the voting booth. The punch card insert is set underneath the candidate/amendment information so that the information corresponds to specific punch-out holes on the card. Immediately above the punch card are holes in a perforatable synthetic sheath through which the stylus punches out the appropriate part of the punch card corresponding to the ballot choices on the inserted card.

The first adaptation, devised by Petitioners Grant Downey and Burns Taylor, incorporated the candidate/amendment information onto a Braille printout, along with step-by-step instructions for use of the system. The Braille instructions corresponded exactly to the ballot choices on the inserted card, and instructed the user as to which holes, from top to bottom, matched each ballot choice.

With this simple adaptation, blind persons who read Braille may vote a secret ballot in like manner as sighted voters. Once a blind voter identifies the hole corresponding to the desired ballot choice, the voter uses the stylus to perforate the punch card below.

The principle underlying this simple adaptation has long been used by the blind community: what sighted persons can accomplish relying on the sense of sight, blind persons can often accomplish through the sense of touch.

However, the number of blind persons who can read Braille fluently enough to vote this way is limited. To solve this problem, Mr. Downey devised an easier and less expensive technique: use of a tape recording. The tape recording contains the same information as the Braille guide and is used with a cassette player and earphones (a "Walkman"). What the Braille adapted system accomplished through the sense of touch the tape adapted system accomplished through hearing and touch.

The end result, a punch card with holes, is deposited in the ballot box, indistinguishable from all other punch cards. The

overlay, used by a voter who is blind, created a secret ballot.

Mr. Downey reviewed three other voting systems commonly used in Texas: a method that electronically scans and counts paper ballots; a manually counted paper ballot system; and a lever machine.

He built a prototype for paper ballot systems,[12] using a three dimensional template into which the paper ballot is inserted. The template has holes that correspond to the choices on the paper ballot which can be identified by blind voters by touch. The voter uses a pencil to fill in the hole marking his/her ballot choice. Candidate/amendment information is conveyed by a tape cassette, as with the punch card system.

Mr. Downey testified, and the Secretary's expert Robert Peters agreed ("piece of cake"), that lever machines adapt even easier than paper ballot systems. Lever machines are three dimensional and merely need candidate/amendment information taped on the machine with a Walkman as a guide.

El Paso County adopted the tape-adapted system in its settlement and used it in the last general election on November 5, 1996, throughout the county.

Petitioners, by designing and inventing voting systems that preserve secrecy for voters who are blind, showed the possibility of easily achievable alternatives.[13] It took Mr. Downey two and one-half hours to figure out how to combine a Walkman and a tape along with an overlay. This showed how easy and inexpensive it was to adapt the ballot for blind voters. 8 ROA 324. The Secretary never explained why he couldn't do the same.

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[12] The Secretary's expert Robert Peters agreed that the system designed by Mr. Downey was workable

[13] Mr. Downey testified that he could modify his system to allow for write-in votes, and he did. 10 ROA 800-01.

The issue, however, is not the competency of the Petitioners' adaptations or inventions; it is the Secretary's failure to comply with the ADA. The El Paso method of accommodating blind voters shows how simple, inexpensive, and "low tech" the adaptation is; and it demonstrates how easy it would be for the Secretary to insist on the same simple mechanisms before he approves a voting system submitted to him for approval.

The Court should shake the Secretary from his slumber; he must stop certifying voting systems until they become accessible to voters with disabilities. Until he stops doing so, the Secretary is violating the ADA.

REASONS FOR GRANTING THE WRIT

1. This Court should correct the Fifth Circuit's decision that a state's chief elections officer has no legal duty under the ADA to modify his election practices and procedures so that citizens with disabilities are afforded an equal opportunity to cast a secret ballot.

The Court of Appeals incorrectly decided that the Secretary had no duty under either Texas law or the ADA to take steps to ensure that local election officials comply with the ADA. This holding stems from the premise that "the ADA is not an election law." *Lightbourn v. County of El Paso, Tex.*, 118 F.3d 421, 430, 432 (5th Cir. 1997).

That the ADA is not an election law is irrelevant and a legal red herring. The opinion is not clear what an "election law" is, perhaps a law that regulates the election process. However, by frmaing the issue this way, the appellate opinion misses the point: the ADA does apply to elections, just as it applies to all facets of government programs. The ADA requires accessibility modifications in a state's voting program.

Moreover, the Court of Appeals incorrectly stated that Petitioners used this lawsuit to ensure that local officials comply with the ADA. Petitioners only attempted to compel

the Secretary to do what the ADA required of him, nothing more and nothing less. As noted already, the district judge carefully tailored his final judgment in that respect, recognizing that his order would have a beneficial "trickle down" effect:

> ...the Court has jurisdiction only over the Secretary in this case. Therefore, only those matters over which the Secretary has direct control are addressed. The ruling of this Court does not directly burden local election officials. However, the Court does acknowledge that, as in many other cases, changes at the top will work changes at the bottom. This holding will, among other things, remove a major impediment to a local voting authority seeking to comply with the ADA, namely the failure of the Secretary to approve an ADA-compliant system. *Lightbourn v. Garza*, 928 F.Supp. at 716 (Appendix C-12).

As noted in the next section, Title II of the ADA, and its regulations, certainly contemplate the joint administration of certain government programs by different agencies and officials. Such is the case with regard to voting in Texas. Bringing one agency or official into compliance with the ADA, one step at a time, has an ameliorative effect on the entire program. That is what Petitioners sought here. They wanted to make the secret ballot accessible,[14] and began with the pivotal figure in that scheme. All they wanted of the Secretary was that he modify

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[14] It is a fundamental constitutional right under Texas law to cast a secret ballot. *Wood v. State ex rel. Lee*, 126 S.W.2d 4 (Tex. 1939) (upholding constitutionality of voting machines because they "accorded a secret ballot" to voters, as guaranteed by state constitution); *Carroll v. State*, 61 S.W.2d 1005, 1007-08 (Tex. Crim. App. 1933) (mandate of Tex. Const. Art. VI, §4, that elections be by ballot construed to mean by secret ballot). *Cf. Oliphint v. Christy*, 299 S.W.2d 933 (Tex. 1957) (qualified voter may not be compelled by court order to disclose secret ballot in election contest).

his own non-delegable, mandatory election duties under Texas law to accommodate those voters with visual and physical disabilities.

By its plain terms, Title II's general prohibition of discrimination applies to discriminatory election practices.[15] Indeed, that "prohibition applies to anything a public entity does." 28 C.F.R. Part 35, App. A §35.102.[16]

While the ADA may not be an election law per se, it does apply to voting and elections, and Congress clearly intended that it do so. The ADA's statement of findings, 42 U.S.C.

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[15] The Fifth Circuit mistakenly relied on *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986), for finding that the violations alleged by Petitioners could not be attributed to the Secretary. *Bush* held that the Texas Jail Standards Commission has no state-created duty to enforce Fourteenth Amendment jail standards in county jails throughout the state as part of its own minimum jail standards. In other words, the circuit would not read Fourteenth Amendment standards into Texas statutory minimum jail standards. However, if Congress decides in the exercise of its Fourteenth Amendment powers to do so, it could pass a statute requiring that such be done with regard to jail conditions. It simply has chosen not to do so.

With passage of the ADA, however, Congress chose to require that certain minimum standards apply throughout state agencies to individuals with disabilities. The ADA applies to the Texas Commission on Jail Standards, and it applies to the voting programs and practices that the Secretary administers.

The Court of Appeals misread *Bush* as controlling the ADA. Congress, however, intended the ADA to override and overcome the very problem created by *Bush*, and to assure that federal standards apply as to individuals with disabilities.

[16] *See also Innovative Health Systems, Inc. v. City of White Plains*, 931 F.Supp. 222, 232 (S.D.N.Y. 1996) (finding "nothing in the text or the legislative history of the ADA to suggest that ... any other governmental activity was excluded from its mandate"); H.R. Rep. No. 485, Part 2, 101st Cong., 2d Sess. 84 (1990) (Title II applies "to all actions of state and local governments").

§12201(a)(3), singled out "voting" as one of the "critical areas" in which "discrimination against individuals with disabilities persist." The Senate Report accompanying the Act quoted the testimony of Illinois's Attorney General, who "focused on the need to ensure access to polling places: 'You cannot exercise one of your most basic rights as an American if the polling places are not accessible.'" S. Rep. No. 116, 101st Cong., 1st Sess. 12 (1989). The issue of voting accessibility also arose in the floor debates. *See* 135 Cong. rec. S10753 (1989) (remarks of Senator Gore) ("As a practical matter, many Americans with disabilities find it impossible to vote. Obviously, such a situation is completely unacceptable and unconscionable. We must take strong action to end the tradition of blatant and subtle discrimination that has made people with disability second-class citizens."); 135 Cong. Rec. S10793 (1989) (remarks of Sen. Biden).

The Fifth Circuit's opinion in this case severely weakens the strong action taken by Congress to end disability-based discrimination in voting -- the passage of the ADA.

Title II provides, without qualification, that "no qualified individual with a disability shall, by reason of such disability, be excluded form participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132.

On its face, Title II reaches any state action that subjects persons with disabilities to discrimination as defined in ADA regulations. By this measure, the Secretary's certification and approval of inaccessible voting systems -- part of a program or activity of his office -- discriminates against blind voters and violates the ADA. The same goes for the Secretary's funding of political party primaries that use inaccessible places and equipment.

a. The Secretary has failed, and continues to fail, to assure that new voting systems or voting system equipment used in Texas elections are accessible to voters with disabilities.

The Secretary has the ultimate say in the approval and use of voting systems and voting system equipment in Texas. Section 122.031 of the Texas Election Code provides that: "[b]efore a voting system or voting system equipment may be used in an election, the system and unit of the equipment must be approved by the secretary of state...." Tex. Elec. Code Ann. §122.031 (Vernon 1997). *See id.* §122.038 (Secretary shall approve system or equipment that satisfies applicable requirements of approval).

Counties that purchase voting systems or equipment must select them from a list approved by the Secretary (or they may develop their own system, which the Secretary must then approve). At time of trial, the Secretary's list contained approximately twenty-seven (27) approved systems, none of which afforded blind voters an equal opportunity to cast a secret ballot and few of which accommodate voters with physical disabilities.

The Fifth Circuit erroneously construed Petitioners' argument to be that §§122.031 and 122.038 oblige the Secretary to approve voting systems or equipment that ensures a secret ballot for blind voters. It is Title II, rather, that obliges the Secretary to not deny the benefits of the services, programs, or activities of his office to individuals with disabilities on the basis of their disability.[17] Sections 121.031 and 121.038,

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[17] The Fifth Circuit wondered where in §§122. 031 and 122.038 Petitioners found "this expansive duty" to approve equipment that provides for a secret ballot for blind voters. *Lightbourn*, 118 F.3d at 4553. Petitioners find it in the plain language of Title II.

however, do delineate a mandatory program or activity of the Secretary. As such, this program -- the certification and approval of voting systems -- must be made accessible to voters with disabilities in accordance with Title II.

The Texas Election Code sets out the eleven criteria that the four commissioners must use in recommending the Secretary's approval of a voting system. *Id.* at §122.001. The first on the list is assurance of secret balloting. The ADA dovetails perfectly with this criteria since Petitioners invoked the ADA to achieve that very benefit, and constitutional right.

Although having the duty and power to do so, the Secretary never developed or promulgated any ADA criteria to assure that voting systems, which he approves, are accessible to persons with disabilities, and that secret balloting is afforded to visually-impaired voters. Tom Watson, one of the four examiners, appointed by the Secretary to recommend approval of voting systems tohim, stated there was no problem with setting up appropriate ADA criteria -- all the examiners needed was the Secretary's fiat. Watson Deposition 46-47. But that never came.

Nor did the examiners receive any information or training about the ADA from the Secretary. Thus, they never asked any voting systems or equipment manufacturers about physical access issues or secret balloting for blind voters. *Id.* 10, 14, 18, 22. Had there been criteria or instructions, the examiners would have insisted on such features. Market forces would then take over and access features would be built into the voting systems.

The court also misconstrued what the Petitioners sought from the Secretary: they did not, as the court wrote, seek to "oblig[e] the Secretary to take affirmative steps to solicit and approve equipment that ensures a completely secret ballot for blind voters." *Id.* Rather, they simply requested that the Secretary not certify equipment that failed to provide blind voters the opportunity to cast a secret ballot.

Id. 15. It would not be an undue burden to require ADA accessibility as part of approving voting systems. *Id.* 39-40.

Because none of the systems approved by the Secretary is accessible to blind voters, and because many of them have inaccessible features for voters with physical disabilities (such as high voting booth counters), the Secretary places Texas counties in a legal bind. The counties must purchase their voting systems or equipment from the Secretary's list, but the list only contains inaccessible choices. The counties, then, must violate federal law by using the list. If, however, the Secretary administered his program in compliance with Title II, he could only approve ADA-accessible voting systems or equipment, thereby releasing the counties from the legal trap in which he has placed them.

b. The Secretary failed to assure that primary elections which he funds are held in compliance with the ADA.

The Court of Appeals did not speak to this point, perhaps because there is no way of excusing the Secretary's non-compliance with the ADA in this matter. He is virtually the sole funder of party primaries, which makes his corresponding ADA duties even more enhanced.

The Secretary has joint responsibility with local officials for caring out elections; the degree of responsibility varies according to the type of election. 9 ROA 637. In party primaries, his role, as the principal funding source and sole source of approval for any relocation of polling sites away from those already approved for county use, is expansive. *See* Tex. Elec. Code Ann. §43.034 (Vernon 1986). As such, his ADA responsibilities are correspondingly greater.

The ADA clearly imposes liability on the Secretary in this instance:

> A public entity, in providing any aid, benefit, or service, may not, directly or through contractual,

licensing or other arrangements, on the basis of disability ....

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others. 28 C.F.R. §35.130(b)(1)(ii)

A voting system is an aid, benefit, and service that permits voters to cast a secret ballot. The Secretary controls the use of voting systems and equipment by party officials through his certification process. He also pays approximately 90% of the primary elections costs ($10-$12 million) through contracts with political parties and local elections officials, who in turn must use a voting system he has approved, none of which assure a secret ballot for blind voters. 9 ROA 657.

The Secretary has not imposed any conditions for the political parties to assure ballot accessibility. Nor has he required or suggested that the parties, as a condition of receiving primary funds from him, familiarize themselves with the ADA and assure accessible polling places. *See id.* 672. Although he routinely mails information to political parties about conducting primaries, he has never included ADA material. He is in violation of the ADA.

c. This Court should correct the Fifth Circuit's decision that the Secretary has no duty under the ADA to conduct a "self-evaluation" of the services, policies, and practices he administers concerning voting systems or equipment used in Texas elections.

One of the chief reasons for the Secretary's breach of his ADA duties is that he never conducted a self-evaluation to measure his level of compliance with the ADA.

Section 35.105 requires that a public entity "shall, within one year of the effective date of this part [January 26, 1992], evaluate its current services, policies, and practices, and the

effects thereof, that do not or may not meet the requirements of this part and, to the extent that modifications of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications." 28 C.F.R. §35.105(a).

Although this regulatory language is plain, comprehensive, mandatory, and proactive, the Fifth Circuit eviscerated this legal duty by holding that §35.105 "merely" required the Secretary to evaluate his department, and not his services, practices, and policies, and the effects thereof. *Lightbourn*, 118 F.3d at 432. This ruling is plainly wrong.

This court's exceedingly narrow reading of §35.105 goes against the plain language of the regulation. The regulation's breadth is sweeping, covering all services and practices of the Secretary. This surely includes the Secretary's approval of voting systems and equipment for use in Texas elections, as well as his funding of the party primaries.

The Secretary approves voting systems or equipment that is not in compliance with the ADA, and accordingly discriminates against voters with disabilities by denying them an equal opportunity to vote a secret ballot. This discrimination, which the ADA sought to cure, went undiscovered because the Secretary failed to perform a self-evaluation. The duty imposed on him to remove discrimination discovered through the self-evaluation process is mandatory,[18] with very narrow exceptions (e.g. "undue burden").

Contrary to the Fifth Circuit's opinion, the Secretary has a mandatory duty under the ADA to evaluate and explore,

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[18] *See* 28 C.F.R. §35.130; *and see Tyler v. City of Manhattan*, 849 F.Supp. 1429 (D.Kan. 1994) (city liable for conducting ADA self-evaluation of all programs, services, and facilities and consulting with disability community).

through all means reasonably available, solutions to the discrimination faced by blind voters. He simply never undertook that process, and violated federal law, with severe adverse consequences for voters with disabilities.

d. The Secretary failed to consult with the disability community as part of the self-evaluation process.

Section 35.105 mandates that interested persons with disabilities, and representative organizations, participate in the self-evaluation process. 28 C.F.R. §35.105(b)&(c). The Secretary, however, never contacted any such individuals on behalf of blind voters. He failed to even involve the Texas Commission of the Blind, the agency designed to assist persons with severe visual impairments, and which has a mailing list of 25,000 people. Had the Secretary fulfilled his §35.105 duty, he would have discovered the discriminatory practices of his office, most notably the approval of inaccessible voting systems and equipment and inaccessible party primaries.

e. The Secretary failed to adapt and modify the advisory functions of his office.

Tom Harrison, the Secretary's deputy for elections, testified that the Secretary has the obligation to provide counties information about their legal responsibilities and inform them of what the ADA requires. 8 ROA 423, 638; Tex. Elec. Code Ann. §31.003 (Vernon 1993).

The counties rely on, and comply with, the Secretary's advice because of budgetary constraints, his expertise, the desire and need for uniformity, and because he is the chief elections officer by law. The counties depend on him for guidance in compliance with both state and federal law.[19]

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[19] *E.g.*, 10 ROA 766-67 (El Paso County Attorney); *id.* 832, 836 (El Paso County elections administrator); 11 ROA 1082-83, 1091 (Harris County elections administrator). The Harris County admi-

Nevertheless, the Secretary never advised counties they should conduct ADA-accessibility surveys, although he had considerable knowledge about the lack of accessibility around the state by virtue of the reporting done between 1985 and 1994 under the Voter Accessibility Act. 8 ROA 618-20, 622-23, 640.

Ann McGeehan, Mr. Harrison's successor, admitted the Secretary could mail out ADA information and evaluations for the counties to use, but did not do so. 10 ROA 957, 962.

f. The Secretary failed to issue directives to foster ADA compliance in Texas elections.

Ms. McGeehan acknowledged the Secretary has the duty to issue directives to local elections officials as to compliance with laws that affect the franchise (10 ROA 881). Yet, he never did so with regard to the ADA.[20]

g. The Secretary failed to adapt toll-free phone numbers and available information for blind voters.

The Secretary operates an 800 toll-free telephone number for information about elections and voting. Although it would be easy to provide a tape recording about ballot propositions, like constitutional amendments, and statewide candidates for blind voters to access through the 800 number, the Secretary never considered this service. *Id.* 589, 680. And he never suggested to counties that they set up an audio-tape system for blind voters in local elections (8 ROA 594), although he easily could have done so (10 ROA 977).

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nistrator said he would comply with any suggestion from the Secretary to do an ADA self-evaluation, set up an advisory group from the disability community, and adapt his voting system. 11 ROA 1082-83, 1091.

[20] Robin Collins testified for the Democratic Party that directives from the Secretary would affect ADA compliance for the better in voting in all 254 Texas counties. 8 ROA 439-40.

The Secretary never considered modifying his public service announcements to direct PSA's to voters with physical or visual disabilities (8 ROA 591-92, 646), although he easily could do so. 10 ROA 934.

Moreover, the Secretary never prepared ballot instructions or voter information in Braille or large print for statewide candidates or ballot propositions, even though large print is easily created, Braille printers are available for word processors, and audio tapes are easily duplicated. 10 ROA 869-70. Had he done this, he would have served 90%-95% of voters with visual impairments. 8 ROA 292-93.

2. This Court should correct the Fifth Circuit's erroneous incorporation of a virtual "intent-to-discriminate" requirement into the ADA. The proper inquiry is whether the public entity's services, policies, and practices, and the effects thereof, discriminate against individuals with disabilities.

The most striking assertion of the Fifth Circuit's opinion was the Court's effective incorporation, in direct conflict with the ADA's express text, of an intent-to-discriminate requirement into the Act. No such requirement exists, and the incorporation of such radically changes a plaintiff's burden in advancing a discrimination claim under Title II. Such an intent requirement turns the ADA on its head, and defeats Congress's efforts to remove disability discrimination from our governmental institutions and society as quickly as possible.

The Court of Appeals, as already discussed, misconstrued Petitioners' argument to be that §§122.031 and 122.038 of the Election Code obligated "the Secretary to take affirmative steps to solicit and approve equipment that ensures a completely secret ballot for blind voters" ....

> The [Petitioners'] assertion that a voting machine for blind voters exists does not prove that the Secre-

> tary violated the ADA because the [Petitioners] do not allege -- let alone prove -- that they presented any voting machine to the Secretary or that he failed to approve such a machine. Perhaps the [Petitioners] could state a claim under Title II of the ADA if they demonstrated that the Secretary wrongly refused to approve such equipment after it was presented to him for approval. *Lightbourn*, 118 F.3d at 431.

Title II does not, however, require that a plaintiff demonstrate that a public entity intended to pay no heed to the plaintiff. Instead, Title II imposes on a public entity the mandatory duty to "evaluate its current services, policies, and practices, and the effects thereof" to determine which are discriminatory, and then "proceed to make the necessary modifications" to eliminate such discrimination. 28 C.F.R. §35.105(a). The Secretary did not do this, and the Fifth Circuit approved of his non-compliance with the ADA.

Whether a public entity intended to discriminate by non-accommodation is of no import under the ADA. The only inquiry is whether the entity's services, policies, and practices, and effects thereof, result in discrimination against individuals with disabilities. Petitioners met this burden: the Secretary's practices -- the systematic approval of inaccessible voting systems and equipment and funding inaccessbile party primaries -- deny voters with visual impairments the right to cast a secret ballot. This is the extent of Petitioners' burden, nothing more.

To require Petitioners to show that the Secretary intentionally refused to accommodate them is to impose a burden that Congress carefully avoided creating. This Court must correct the Fifth Circuit's reading of the ADA

Moreover, the appellate bench ignored Title II regulations, namely:

(3) A public entity may not, directly or through contractual or other arrangements utilize criteria or methods of administration:

(i) That have the *effect* of subjecting qualified individuals with disabilities to discrimination on the basis of disability [emphasis added].

28 C.F.R. §35.130(b)(3)(i).

Title II should be read in harmony with Title I of the ADA, which, as the employment provision of the ADA, defines "discriminate" as "utilizing standards, criteria, or methods of administration ... that have the *effect* of discrimination on the basis of disability...." 42 U.S.C. §12112(b)(3)(A) (emphasis added).

Congress clearly intended the ADA to undo the effects of discrimination as part of the purpose of the Act "to provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities." *Id.* §12101(b)(1). The discrimination that Congress sought to remedy through the ADA was the kind born more out of ignorance than ill will.

The ADA does not have an intent requirement, as does standard Fourteenth Amendment litigation. Perhaps the latter jurisprudence led the appellate court into error. Rather, the ADA is remedial in nature and more closely akin to Title VII employment law[21] and the Voting Rights Act (42 U.S.C. §1973).

The Court of Appeals incorrectly refused to find the effects of discrimination against voters with disabilities, caused by the Secretary's non-compliance with the ADA, illegal.

The circuit court erred on this point as well.

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[21] 42 U.S.C. §2000a *et seq.* *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct 849, 28 L.Ed.2nd 158 (1971).

CONCLUSION

The Court of Appeals grievously misconstrued Title II of the ADA. The court denied blind voters the right to a secret ballot and took away the guarantee that voters with mobility disabilities would have access to their polling places.

Not only did the Fifth Circuit undermine the right of voters to disabilities to cast a secret ballot on election day, but the court dramatically rewrote the ADA, standing it on its head, so the persons with disabilities can not find remedy against their government unless they can show an intent to discriminate. Moreover, the appellate panel failed to apply the plain language of the ADA to the Secretary's duties.

The Court of Appeals undercut the remedial purpose of the ADA, and thwarted Congressional intent. Unless this Court corrects the opinion blow, and restores judgment to Petitioners, the Fifth Circuit opinion will affect adversely voters throughout the circuit, and very likely throughout the nation.

The Fifth Circuit's opinion is as solid a barrier to voters with disabilties as the physical obstacles they encounter daily.

Because of the national impact of this case and its grave injustice to voters with visual and physical disabilities, Petitioners pray that the Court grant this petition for certiorari.

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Respectfully submitted,

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